TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 508

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 10, 1880.

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INDEX.

	Original.	Print.
Petition, filed July 14, 1879	1	1
Special plea, filed August 9, 1879	18	11
Traverse, filed August 16, 1879	19	12
Findings of fact and conclusion of law	20	12
Opinion of the court	24	17
Final judgment of the court	28	20
Application for and allowance of an appeal	29	20
Certificate	30	21

1 United States Court of Claims.

THE CHICAGO AND NORTHWESTERN RAILroad Company
against
THE UNITED STATES. } No. 12063.

I.—*Petition.*—*Filed July* 14, 1879.—*J. R.*

To the honorable chief justice and justices of the Court of Claims:

The plaintiff, your petitioner, "The Chicago and Northwestern Railway Company," respectfully represents:

1st. That it is a corporation duly incorporated under the laws of the States of Illinois, Wisconsin, and Michigan, with its principal office of business at Chicago, Illinois.

2d. That on the first day of July, A. D. 1875, and ever since that day, the plaintiff was, and has been, the owner of a certain railroad and its equipments, extending from Chicago, in the State of Illinois, to the Mississippi River, at a point called Fulton, a distance of one hundred and thirty-seven (137) miles. And that during all of said time the plaintiff was the lessee and in possession of a railroad extending from the east bank of said river to the town of Cedar Rapids, in the said State of Iowa, a distance of eighty-two and half ($82\frac{1}{2}$) miles, which latter road is known as the Chicago, Iowa and Nebraska Railroad, and is owned by a company of that name. And during all of said time the said plaintiff was also the lessee and in possession of a railroad extending from the said town of Cedar Rapids to the Missouri River, at a point called Union Pacific Transfer, in the said State of Iowa, a
2 distance of two hundred and seventy (270) miles, which last-mentioned road is known as the Cedar Rapids and Missouri River Railroad, and is owned by a company of that name. That the said three roads above described form a continuous line between the said city of Chicago and the said Union Pacific Transfer, and your petitioner has during all of said time operated and regularly run its trains over the same.

3d. That on and after the first day of July, A. D. 1875, aforesaid, your petitioner regularly transported the United States mails upon its trains over the said roads between Chicago and Union Pacific Transfer, and on the 13th day of September, A. D. 1875, the Postmaster-General of the United States, on behalf of the United States, entered into a written contract with your petitioner for the transportation of the said mails over the said railroads between Chicago and Union Pacific Transfer aforesaid, a duly-certified copy of which contract is attached to and made a part of this petition, and marked Exhibit A.

And your petitioner further represents that it is, and has been ever since the first day of July, A. D. 1875, the owner and operator of another railroad, extending from Chicago, in the State of Illinois, to Green Bay, in the State of Wisconsin, a distance of two hundred and forty-three (243) miles, and that on and after the said first day of July, A. D. 1875, your petitioner regularly transported the United States mails over the said railroad between the said points; and that on the eighth day of September, eighteen hundred and seventy-five, a written contract was entered into by your petitioner with the Postmaster-General, in behalf of the United States, for the transportation of the United States mails over the said road between Chicago and Green Bay, a

copy of which contract, duly certified, is attached to and made a part of this petition, and marked Exhibit B.

And your petitioner further represents that it is, and ever since the said first day of July, 1875, has been, the owner and operator of another railroad, extending from Fort Howard, in the State of Wisconsin, to Ishpeming, in the State of Michigan, a distance of one hundred and eighty-one and one-fifth (181$\frac{1}{5}$) miles; and that on and after the said first day of July, A. D. 1875, it regularly transported the mails over said last-mentioned road between said points, and that on
3 the ninth day of September, A. D. 1875, a written contract was made and entered into by your petitioner and the Postmaster-General, on behalf of the United States, for the transportation of the United States mails over the said road between Fort Howard and Ishpeming aforesaid, a copy of which contract, duly certified, is hereto attached, marked Exhibit C, and made a part of this petition.

And your petitioner further represents that it has faithfully kept and performed each and all of the conditions in the said several contracts to be kept and performed on its part, and has, from the said first day of July, 1875, ever since to the present time, faithfully conveyed the mails upon each of the said routes in all respects as required by the terms of the said contracts respectively; and that the Posmaster-General has never discontinued or curtailed the said service, in whole or in part, on either of the said routes, nor notified your petitioner that he desired so to do, or that the public interests, in his judgment, required such discontinuance or curtailment for any cause. And your petitioner avers that the said mail service could not have been discontinued upon either of the said routes without very great injury and embarrassment to the public interests.

Your petitioner further represents that the said railroad between Cedar Rapids and Union Pacific Transfer, belonging to the said Cedar Rapids and Missouri River Railroad Company, and which is leased to your petitioner as aforesaid, and the said railroad between Fort Howard and Ishpeming, and that portion of the said road between Chicago and Green Bay which lies between Fondulac and Green Bay, a distance of sixty-six and one-half (66$\frac{1}{2}$) miles, severally received grants of public lands from the United States, which several grants contained conditions, to wit, that the several railroads so aided should carry the mails at such rates as Congress should by law direct, but until Congress should so direct the Postmaster-General should fix the rates for such transportation; that the said acts of Congress making the said several grants were passed in the year 1856.

And your petitioner further represents that on or about the fifteenth day of October, 1876, your petitioner was notified by the Second Assistant Postmaster-General, in writing, that the Postmaster-General had
4 issued an order, to wit, Order No. 4562, dated August eighteenth, 1876, in which order the said Postmaster-General declared that the provision contained in the "Act making appropriations for the service of the Post-Office Department," etc., approved July 12, 1876, which directed the Postmaster-General to readjust the compensation to be paid from and after the first day of July, 1876, for transportation of mails on railroad routes, by reducing the compensation of railroad companies for such transportation ten per centum per annum, etc., did not affect contracts made in due form of law with railroad companies for such transportation of the mails for a term not then expired.

And your petitioner further represents that about the twentieth day of October, 1876, your petitioner was informed by the 2d Assistant

Postmaster-General that the said Post-Office Department claimed the right under the provisions of the said act of July 12, 1876, entitled "An act making appropriations for the service of the Post-Office Department," etc., to, and should, reduce the compensation of your petitioner for the transportation of the mails under the said several contracts. That your petitioner protested against such action of the Post-Office Department, and claimed that the provisions of the said act did not apply to the transportation of the mails under existing contracts. And your petitioner has at all times protested against such reduction; nevertheless the said Post-Office Department has reduced the compensation of your petitioner from the amounts provided in the said contracts, from the first day of July, 1876, as follows, to wit:

Upon the said route from Chicago to Union Pacific Transfer a reduction has been made at the rate of $18,547.70 per annum.

Upon the said route from Chicago to Green Bay a reduction has been made at the rate of $3,537.80 per annum.

And upon the said route from Fort Howard to Ishpeming a reduction has been made at the rate of $4,543.56 per annum.

And your petitioner further represents that the said Post-Office Department has claimed the right, under the act approved June 17, 1878, entitled "An act making appropriations for the service of the Post-Office Department," etc., for the year 1879, to, and has, made a still further reduction of the compensation for the transportation of the mails under the said contracts, as follows:

For the year commencing on the first day of July, 1878, and ending June 30, 1879, viz: On the said route between Chicago and Union Pacific Transfer, $2,384.70; on the said route between Chicago and Green Bay, $454.86; and on the said route between Fort Howard and Ishpeming, $584.17. And that your petitioner has at all times objected to and protested against the right of the Post-Office Department to make these reductions under the said act last aforesaid.

That the amounts deducted as aforesaid have been and are wrongfully withheld from your petitioner, and that there is justly due from the United States, after allowing all just credits and offsets, to your petitioner, on account of the transportation of the mails as aforesaid under said contracts, up to and including the quarter ending on the thirtieth day of June, A. D. 1879, the following sums, to wit: For the transportation of the mails on route No. 23003, Chicago to Union Pacific Transfer, the sum of fifty-eight thousand and twenty-seven dollars and eighty cents ($58,027.80). On route No. 25009, Chicago to Green Bay, the sum of eleven thousand and sixty-eight dollars and twenty-six cents ($11,068.26). On route No. 24031, Fort Howard to Ishpeming, the sum of fourteen thousand two hundred and fourteen dollars and eighty-five cents ($14,214.85). Making in all the sum of eighty-three thousand three hundred and ten dollars and ninety-one cents ($83,310.91). And that no assignment or transfer of said claim, or any part thereof, or interest therein, has been made. Wherefore your petitioner prays that a judgment may be rendered in its favor for the said sum of eighty-three thousand three hundred and ten dollars and ninety-one cents ($83,310.91).

J. F. FARNSWORTH,
Attorney for Complainant.

STATE OF ILLINOIS,
County of Cook, ss:

Albert Keep, being duly sworn, doth depose and say that he is the president of the said Chicago and Northwestern Railway Company, the

complainant; that he is acquainted with the statements and facts set forth in the foregoing petition, and that he believes the same to be true.

ALBERT KEEP.

6 Subscribed and sworn to before me, this 7th day of July, 1879.

[L. S.] JOSEPH B. REDFIELD,
Notary Public.

UNITED STATES OF AMERICA
POST-OFFICE DEPARTMENT,
Washington, D. C., Feb'y 13th, 1879.

I, D. M. Key, Postmaster-General of the United States of America, certify that the annexed are true copies of the original contracts now on the files in this department.

In testimony whereof I have hereto set my hand, and caused the seal of the Post-Office Department to be affixed, at the city of Washington, the day and year above written.

[L. S.] D. M. KEY,
Postmaster-General.

EXHIBIT A.

[Albert Keep, pres't, Chicago, Cook Co., Ills.]

UNITED STATES OF AMERICA:

Contract for railroad mail service.

No. 23003.] [$131,588 per annum.

This article of contract, made the thirteenth day of September, in the year one thousand eight hundred and seventy-five, between the United States of America (acting in this behalf by the Postmaster-General) and the Chicago and Northwestern Railway Company, by Albert Keep, its president, and Wm. H. Ferry and Henry H. Porter, as sureties:

Witnesseth, that whereast he said railroad company has been accepted, according to law, as contractor for conveying the mail on route No. 23003, from Chicago, Ill., by Central Park, Austin, Oak Park, Elmhurst, Lombard, Prospect Park, Wheaton, Winfield, Turner, Geneva, La Fox, Blackberry Sta., Lodi Sta., Courtland Sta., De Kalb Centre, Malta, Creston, Rochelle, Flag Sta., Ashton, Franklin Grove, Nachusa, Dixon (C. H.), Nelson, Sterling, Galt, Round Grove, Morrison (C. H.),
7 Union Grove, Fulton, Clinton (Iowa), Camanche, Low Moor, Malone, De Witt (C. H.), Grand Mound, Calmus, Wheatland, Lowden, Clearance, Stanwood, Mechanicsville, Lisbon, Mt. Vernon, Bertram, Cedar Rapids, Fairfax, Florence, Watkins, Blairstown, Luzerne, Belle Plain, Chelsea, Tama City, Morton, Le Grand, Quarry, Marshalltown, Lamoille, State Centre, Colo, Nevada (C. H.), Ames, Ontario, Boone, Boonesboro, Moingona, Ogden, Jefferson (C. H.), Glidden, Carroll City, Arcadia, West Side, Vail, Denison (C. H.), Danville, Dunlap, Woodbine, Mo. Valley, Loveland, Honey Creek, Crescent City, and Council Bluff, to Union Pacific Transfer (N. O.), and back by railroad, eighteen times a week to Franklin, and twelve times a week on residue, or as much oftener as trains may run, by a schedule satisfactory to the department, at one hundred and thirty-one thousand five hundred and eighty-eight dollars per year (being $268 per mile per an-.

num), for and during the term beginning July first, eighteen hundred and seventy-five, and ending June thirty, eighteen hundred and seventy-nine:

Now, therefore, the said Chicago and Northwestern Railroad Company, as contractor, and the said William H. Ferry and Henry H. Porter, as sureties, do, jointly and severally, undertake, covenant, and agree with the United States, and do bind themselves—

1st. That the mail (including British, Canada, and other foreign mails) shall be conveyed in a secure and safe manner, free from wet or other injury, in a separate and convenient car, or apartment of a car, suitably fitted up, furnished, warmed, and lighted, under direction of the Post-Office Department, and to the satisfaction of the Postmaster-General, or of his authorized agent, at the expense of the contractor, for the assorting and safe-keeping of the mails, and for the exclusive use of the department and its mail agent, if the department shall employ such agent; and such agent is to be conveyed free of charge. When there is no agent of the department the railroad company shall designate a suitable person, upon each train, to be sworn, to receive and take charge of the mails, and of way-bills accompanying and describing them, and duly deliver the same. And the mail shall be taken from and delivered into the post-offices at the ends of the route, and also from and into the intermediate offices on the route, or that may hereafter be established on the route, provided the latter are not
8 over one-quarter of a mile from a depot or station, or from the railroad track when no station has been established.

2d. That if the company shall run a regular train of passenger-cars more frequently than is required by the contract to carry the mail, the same increased frequency shall be given to the mail, and without increase of compensation, and the like as to the increase speed of the mail trains, if desired by the Postmaster-General.

3d. That the company shall convey, free of charge, all mail-bags and post-office blanks; and also all accredited special agents of the department, on exhibition of their credentials.

4th. That the company shall not, by itself nor by its agents, transmit, nor be concerned in transmitting, commercial intelligence more rapidly than by mail, nor carry out of the mail any letters not enclosed in postage-stamped envelopes, except such as may have relation solely to some article at the same time conveyed.

5th. That in every case of failure to perform the trip (unless it is shown that the same was not caused by misconduct, neglect, or want of proper skill) there may be a forfeiture of the pay for the trip; and a failure to arrive at the end of the route, so as to lose the connection with a depending mail, shall be considered as equal to a whole trip lost, unless the detention or delay be the result of unavoidable causes.

6th. That the company shall be subject to fine for failure to take or deliver a mail, or any part of a mail; for suffering the mail to be wet or otherwise injured, or lost, or destroyed, unless it shall appear that such failure, or other incident, as aforesaid, was not caused by misconduct, neglect, or want of proper skill on the part of the company or its officers.

7th. That the company shall be answerable for the adequacy of the means of transportation; for the faithfulness, ability, and diligence of its agents; and for the safety, due receipt, and delivery, as aforesaid, of the mails.

8th. That the company will collect quarterly, if required by the Postmaster-General, of postmasters on the route, the balances due from them

to the United States on their quarterly returns, and faithfully render an account thereof to the Postmaster-General in the settlement of
9 its quarterly accounts, and will pay over to the Auditor of the Treasury for the Post-Office Department, on the order of the Postmaster-General, all balances remaining in its hands.

9th. That the Postmaster-General may discontinue or curtail the service, in whole or in part, whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any cause, he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and a pro-rata compensation for the amount of service retained and continued.

10th. The said United States covenant with the said company to pay as aforesaid at the rate aforementioned, quarterly, in the months of November, February, May, and August, or in the preceding months, at the option of the department.

Provided always that this contract shall, in all its parts, be subject to the terms and requisitions of an act of Congress passed the twenty-first day of April, in the year one thousand eight hundred and eight, entitled "An act concerning public contracts."

In witness whereof the said Postmaster-General has caused the seal of the Post-Office Department to be hereto affixed, and has attested the same by his signature, and the said railroad company, by its president and sureties, have hereunto set their hands and seals the day and year set opposite their names respectively.

[SEAL.] J. W. MARSHALL,
Acting Postmaster-General.

Signed, sealed, and delivered by the Postmaster-General in the presence of—
J. N. DORRIS,
J. L. F.

And by the other parties hereto in the presence of—
J. S. REYNOLDS,
W. S. HOWELL,
Witnesses.

Signed this 3d day of Nov., 1875.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, [SEAL.]
By ALBERT KEEP, *Pres't.*

Signed this 3d day of Nov., 1875.
WM. H. FERRY, [SEAL.]

10 Signed this 3d day of Nov., 1875.
HENRY H. PORTER, [SEAL.]
Sureties.

POST-OFFICE, CHICAGO, ILL.,
November 4, 1875.

I hereby certify that William H. Ferry and Henry H. Porter are good and sufficient sureties for the amount of the foregoing contract.
J. MCARTHUR,
Postmaster.

EXHIBIT B.

[A. Keep, pres't, Chicago, Cook Co., Ills.]

UNITED STATES OF AMERICA:

Contract for railroad mail service.

No. 25009.] [$56,350 per annum.

This article of contract, made the eighth day of September, in the year one thousand eight hundred and seventy-five, between the United States of America (acting in this behalf by the Postmaster-General) and the Chicago and Northwestern Railway Company, by Albert Keep, its president, and William H. Ferry and Henry H. Porter, as sureties:

Witnesseth, That whereas the said railroad company has been accepted, according to law, as contractor for conveying the mail on route No. 25009, from Chicago (C. H.), Ill., by Maplewood, Irving Park, Jefferson, Norwood Park, Park Ridge, Des Plaines, Arlington Heights, Palatine, Barrington Sta., Carey Station, Nunda, Ridgefield, Woodstock (C. H.), Harvard, Laurence, Sharon (Wis.), Clinton, Tiffany, Shopiere, Janesville (C. H.), Milton Junction, Koshkoming, Fort Atkinson, Jefferson, Johnson's Creek, Watertown, Clyman, Juneau, Minnesota Junction, Burnett Station, Burnett, Chester Station, Oak Centre, Oakfield, Fondulac, Vandyne, Oshkosh, Neenah, Menasha, Appleton, Little Chute, Kaukauna, Wrightstown, Little Rapids, West Depere, Depere, and Fort Howard, to Green Bay, and back, 18 times a week, and 6 times a week additional, one way, to Harvard, and 12 times a week the residue, or as much oftener as trains may run, by a schedule satisfactory to the department, at fifty-six thousand three hundred
11 and fifty dollars per year (being at the rate of $230 per mile per annum), for and during the term beginning July first, eighteen hundred and seventy-five, and ending June thirty, eighteen hundred and seventy-nine;

Now, therefore, the said Chicago and Northwestern Railway Company, as contractor, and the said William H. Ferry and Henry H. Porter, as sureties, do, jointly and severally, undertake, covenant, and agree with the United States, and do bind themselves—

1st. That the mail (including British, Canada, and other foreign mails) shall be conveyed in a secure and safe manner, free from wet or other injury, in a separate and convenient car, or apartment of a car, suitably fitted up, furnished, warmed, and lighted, under direction of the Post-Office Department, and to the satisfaction of the Postmaster-General, or of his authorized agent, at the expense of the contractor, for the assorting and safe-keeping of the mails, and for the exclusive use of the department and its mail agent, if the department shall employ such agent; and such agent is to be conveyed free of charge. When there is no agent of the department the railroad company shall designate a suitable person, upon each train, to be sworn, to receive and take charge of the mails, and of way-bills accompanying and describing them, and duly deliver the same. And the mail shall be taken from and delivered into the post-offices at the ends of the route, and also from and into the intermediate offices on the route, or that may hereafter be established on the route, provided the latter are not over one-quarter of a mile from a depot or station, or from the railroad track when no station has been established.

2d. That if the company shall run a regular train of passenger-cars

more frequently than is required by the contract to carry the mail, the same increased frequency shall be given to the mail, and without increase of compensation, and the like as to the increase speed of the mail trains, if desired by the Postmaster-General.

3d. That the company shall convey, free of charge, all mail-bags and post-office blanks; and also all accredited special agents of the department, on exhibition of their credentials.

4th. That the company shall not, by itself nor by its agents,
12 transmit, nor be concerned in transmitting, commercial intelligence more rapidly than by mail, nor carry out of the mail any letters not enclosed in postage-stamped envelopes, except such as may have relation solely to some article at the same time conveyed.

5th. That in every case of failure to perform the trip (unless it is shown that the same was not caused by misconduct, neglect, or want of proper skill) there may be a forfeiture of the pay for the trip; and a failure to arrive at the end of the route, so as to lose the connection with a depending mail, shall be considered as equal to a whole trip lost, unless the detention or delay be the result of unavoidable causes.

6th. That the company shall be subject to fine for failure to take or deliver a mail, or any part of a mail; for suffering the mail to be wet or otherwise injured, or lost, or destroyed, unless it shall appear that such failure, or other incident, as aforesaid, was not caused by misconduct, neglect, or want of proper skill on the part of the company or its officers.

7th. That the company shall be answerable for the adequacy of the means of transportation; for the faithfulness, ability, and diligence of its agents; and for the safety, due receipt, and delivery, as aforesaid, of the mails.

8th. That the company will collect quarterly, if required by the Postmaster-General, of postmasters on the route, the balances due from them to the United States on their quarterly returns, and faithfully render an account thereof to the Postmaster-General in the settlement of its quarterly accounts, and will pay over to the Auditor of the Treasury for the Post-Office Department, on the order of the Postmaster-General, all balances remaining in its hands.

9th. That the Postmaster-General may discontinue or curtail the service, in whole or in part, whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any cause, he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and a pro-rata compensation for the amount of service retained and continued.

10th. The said United States covenant with the said company to pay, as aforesaid, at the rate aforementioned, quarterly, in the months of November, February, May, and August, or in the preceding months, at the option of the department.

Provided always that this contract shall, in all its parts, be
13 subject to the terms and requisitions of an act of Congress passed the twenty-first day of April, in the year one thousand eight hundred and eight, entitled "An act concerning public contracts."

In witness whereof the said Postmaster-General has caused the seal of the Post-Office Department to be hereto affixed, and has attested the same by his signature; and the said railroad company, by its president and sureties, have hereunto set their hands and seals the day and year set opposite their names respectively.

[SEAL.]

J. W. MARSHALL,
Acting Postmaster-General.

Signed, sealed, and delivered by the Postmaster-General in the presence of—
J. N. DORRIS,
J. L. F.

And by the other parties hereto in the presence of—
J. S. REYNOLDS,
W. S. HOWELL,
Witnesses.

CHICAGO, *Oct.* 23*d*, 1875.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, [SEAL.]
By ALBERT KEEP, *President.*

Attest:
J. B. REDFIELD,
Asst. Sec'y.

WM. H. FERRY, [SEAL.]
OCT. 23d, '75.

HENRY H. PORTER, [SEAL.]
OCT. 23D, '75. *Sureties.*

POST-OFFICE, CHICAGO, ILLS.,
October 26, 1875.

I hereby certify that William H. Ferry and Henry H. Porter are good and sufficient sureties for the amount of the foregoing contract.
J. McARTHUR,
Postmaster.

14 EXHIBIT C.

CHICAGO, COOK CO., ILLS.

UNITED STATES OF AMERICA:

Contract for railroad mail service.

No. 24031.] [$16,308 per annum.

This article of contract, made the 9th day of September, in the year one thousand eight hundred and seventy-five, between the United States of America (acting in this behalf by the Postmaster-General) and the Chicago and Northwestern Railway Company, by Albert Keep, its president, and William H. Ferry and Henry H. Porter, as sureties:

Witnesseth, that whereas the said railroad company has been accepted, according to law, as contractor for conveying the mail on route No. 24,031, from Fort Howard, Wis., by Velp, Suamico, Little Suamico, Pensaukie, Oconto, Cevoit, Peshtigo, Menekaune, Marinette, Menominee, (Mich.), Wacedah, Bagley, English, Spalding, Ford River, Escanaba, Brampton, Lathrop, and Negaunee, to Ishpeming, and back, by railroad, 7 times a week, or as much oftener as trains may run, by a schedule satisfactory to the department, at sixteen thousand three hundred and eight dollars per year (being at the rate of $90 per mile per annum), for and during the term beginning July first, eighteen hundred and seventy-five, and ending June thirty, eighteen hundred and seventy-nine:

Now, therefore, the said Chicago and Northwestern Railway Company, as contractor, and the said William H. Ferry and Henry H. Porter, as sureties, do, jointly and severally, undertake, covenant, and agree with the United States, and do bind themselves—

1st. That the mail (including British, Canada, and other foreign mails) shall be conveyed in a secure and safe manner, free from wet or other injury, in a separate and convenient car, or apartment of a car, suitably fitted up, furnished, warmed, and lighted, under direction of the Post-Office Department, and to the satisfaction of the Postmaster-General, or of his authorized agent, at the expense of the contractor, for the assorting and safe-keeping of the mails, and for the exclusive use of the Department and its mail agent, if the Department shall employ such agent; and such agent is to be conveyed free of charge. When there is no agent of the department the railroad company shall designate a suitable person, upon each train, to be sworn, to receive and take charge of the mails, and of way-bills accompanying and describing them, and duly deliver the same. And the mail shall be taken from and livered into the post-offices at the ends of the route, and also from and into the intermediate offices on the route, or that may hereafter be established on the route, provided the latter are not over one-quarter of a mile from a depot or station, or from the railroad track when no station has been established.

2d. That if the company shall run a regular train of passenger-cars more frequently than is required by the contract to carry the mail, the same increased frequency shall be given to the mail and without increase of compensation, and the like as to the increase speed of the mail trains if desired by the Postmaster-General.

3d. That the company shall convey free of charge all mail-bags and post-office blanks; and also all accredited special agents of the department, on exhibition of their credentials.

4th. That the company shall not, by itself nor by its agents, transmit, nor be concerned in transmitting, commercial intelligence more rapidly than by mail, nor carry out of the mail any letters not enclosed in postage-stamped envelopes, except such as may have relation solely to some article at the same time conveyed.

5th. That in every case of failure to perform the trip (unless it is shown that the same was not caused by misconduct, neglect, or want of proper skill) there may be a forfeiture of the pay for the trip; and a failure to arrive at the end of the route, so as to lose the connection with a depending mail, shall be considered as equal to a whole trip lost, unless the detention or delay be the result of unavoidable causes.

6th. That the company shall be subject to fine for failure to take or deliver a mail or any part of a mail; for suffering the mail to be wet or otherwise injured, or lost, or destroyed, unless it shall appear that such failure or other incident as aforesaid was not caused by misconduct, neglect, or want of proper skill on the part of the company or its officers.

7th. That the company shall be answerable for the adequacy of the means of transportation; for the faithfulness, ability, and diligence of its agents; and for the safety, due receipt, and delivery as aforesaid of the mails.

8th. That the company will collect quarterly, if required by the Postmaster-General, of postmasters on the route, the balances due from them to the United States on their quarterly returns, and faithfully render an account thereof to the Postmaster-General in the settlement of its quarterly accounts, and will pay over to the Auditor of the Treasury for the Post-Office Department, on the order of the Postmaster-General, all balances remaining in its hands.

9th. That the Postmaster-General may discontinue or curtail the service, in whole or in part, whenever the public interests, in his judg-

ment, shall require such discontinuance or curtailment for any cause, he allowing as a full indemnity to the contractor one month's extra pay on the amount of service dispensed with, and a pro-rata compensation for the amount of service retained and continued.

10th. The said United States covenant with the said company to pay as aforesaid the rate aforementioned, quarterly, in the months of November, February, May, and August, or in the preceding months, at the option of the department.

Provided always that this contract shall in all its parts be subject to the terms and requisitions of an act of Congress passed the twenty-first day of April, in the year one thousand eight hundred and eight, entitled "An act concerning-public contracts."

In witness whereof the said Postmaster-General has caused the seal of the Post-Office Department to be hereto affixed, and has attested the same by his signature; and the said railroad company, by its president and sureties, have hereunto set their hands and seals the day and year set opposite their names respectively.

[SEAL.] J. W. MARSHALL,
Acting Postmaster-General.

Signed, sealed, and delivered by the Postmaster-General in the presence of—
J. N. DORRIS,
J. L. F.

17 And by the other parties hereto in the presence of—
J. S. REYNOLDS,
W. S. HOWELL,
Witnesses.

[CO.'S SEAL.] CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
By ALBERT KEEP, *President.*

OCT. 23, 1875.

Attest:
J. B. REDFIELD,
Ass't Sec'y.

WM. H. FERRY, [SEAL.]

OCT. 23D, '75.

HENRY H. PORTER, [SEAL.]
Sureties.

OCT. 23D, '75.

POST-OFFICE, CHICAGO, ILL'S.,
October 26, 1875.

I hereby certify that William H. Ferry and Henry H. Porter are good and sufficient sureties for the amount of the foregoing contract.
J. MCARTHUR,
Postmaster.

18 II.—*Special plea.—Filed August* 9, 1879.

And now comes the Attorney-General, on behalf of the defendants, and denies that said claimants are a corporation duly incorporated as alleged in said petition.

THOMAS SIMONS,
Ass't Att'y-General.

19 III.—*Traverse.*—*Filed August* 16, 1879.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Ass't Att'y-General.

20 IV.—*Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The contracts annexed to and forming part of the petition were executed by the parties for the transportation of the United States mails, as set forth in the petition.

II.

The claimants carried the mails upon each of the routes prescribed by the contracts, during the term of four years, as required by the terms of the said contracts.

III.

The following circulars were sent on the days of their respective dates by the Second Assistant Postmaster-General to the claimants:

"(CIRCULAR.)

"*Reduction of pay for mail service on railroad routes, under act of Congress of July* 12, 1876.

"POST-OFFICE DEPARTMENT,
"OFFICE OF THE SECOND ASSISTANT POSTMASTER-GENERAL,
"*Washington, D. C., October* 13, 1876.

"SIR: You are hereby notified that the Postmaster-General has issued the following order:

"POST-OFFICE DEPARTMENT,
"*Washington, D. C., August* 18*th*, 1876.

"Whereas the act of Congress entitled 'An act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes,' approved July 12, 1876, contains the following proviso, namely: 'Provided, That the Postmaster-General be, and he is hereby,

authorized and directed to readjust the compensation to be paid from and after the 1st day of July, 1876, for transportation of mails on railroad routes, by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates fixed and allowed by the first section of an act entitled "An act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-four, and for other purposes," approved March 3d, 1873, for the transportation of mails on the basis of the average weight.'

"And whereas the Assistant Attorney-General of the Post-Office Department has advised, with reference to railway service performed under contract with the government, 'that when the contract has been made in due form of law with a railroad company for the transportation of the mails for a term not yet expired, such contract is not affected' by said proviso.

21 "It is hereby ordered that, in making payments for mail service on railroad routes, performed on and after July 1, 1876, and not performed under contract made in due form of law, for a term not yet expired, the Auditor of the Treasury for the Post-Office Department be authorized to reduce the compensation ten per centum per annum from the rates named in orders heretofore issued, the rates so named having been fixed and allowed under the act of March 3, 1873.

"JAMES N. TYNER,
"*Postmaster-General.*

"Order No. 4562. August 18, 1876.

"Consequently, for mail service performed on and after July 1, 1876, on your road, route 23056, between Geneva and Batavia, the compensation will be reduced from $175.00 to $157.50 per annum; of which please take due notice.

"Very respectfully, your obedient servant,
"J. L. FRENCH,
"*Act'g Second Ass't Postmaster-General.*

"To H. H. PORTER, Esq.,
"*General Manager Chicago and*
"*Northwestern R. R. Co., Chicago, Ills.*"

"(CIRCULAR.)

"*Reduction of pay for mail service on land-grant railroads, under act of Congress of July 12, 1876.*

"POST-OFFICE DEPARTMENT,
"OFFICE OF THE SECOND ASSISTANT POSTMASTER-GENERAL,
"*Washington, D. C., 20 Oct.*, 1876.

"SIR: The act of Congress entitled 'An act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes,' approved July 12, 1876, section 1, contains the following proviso, namely: 'Provided, That the Postmaster-General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-six, for transportation of mails on railroad routes, by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates fixed and allowed by the first section

of an act entitled "An act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-four, and for other purposes," approved March third, eighteen hundred and seventy-three, for the transportation of mails on the basis of the average weight.'

"The same act also contains the following section:

"'SECTION 13. That railroad companies whose railroad was constructed in whole or in part by a land-grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only eighty per centum of the compensation authorized by this act.'

"Consequently, for mail service performed on and after July 1, 1876, on your road, route 25009, between Chicago and Green Bay, the compensation will be reduced from $56,350 per annum (the amount warranted by the latest returns under the act of March 3, 1873) to $45,080 per annum, the reduction amounting to $11,270 per annum, of which the sum of $ is due to the proviso in the first section, and the sum of $11,270 to the thirteenth section of the act of July 12th, 1876, above quoted.

"Very respectfully, your obedient servant,

"THOS. J. BRADY,

"*Second Assistant Postmaster-General.*

"To ALBERT KEEP, Esq.,

"*President C. & N. W. R. R. Co., Chicago, Ill.*"

And circulars similar to the last were sent the claimants as to the remaining contract routes.

IV.

On the 18th day of October, 1876, the general solicitor of the claimants replied by letter to the said circulars, in which letters he stated as follows:

"I desire to call your attention to the fact that the mail service over the road of this company specified in each of said circulars is performed 'under contracts made in due form of law for a term not yet ex-
22 pired,' which contracts are on file in the Post-Office Department, and of which we have copies. I presume, therefore, that the reduction specified in said circulars cannot be made in accordance with the opinion of the law department of the Post-Office, and that the existence of the contracts above named has been overlooked.

"Route 23003 is over the Chicago and Northwestern Railway from Chicago to the Mississippi River, 138 miles, and over the Chicago, Iowa and Nebraska Railroad from the Mississippi River to Cedar Rapids, 81 miles, and the Cedar Rapids and Missouri River Railroad to Council Bluffs, 270 miles. Neither the Chicago and Northwestern Railway, from Chicago to Clinton, nor the Chicago, Iowa and Nebraska Railroad, from Clinton to Cedar Rapids, is a 'road constructed in whole or in part by a land-grant made by Congress on the condition that the mails should be transported over it at such price as Congress should by law direct,' and consequently the law does not require the reduction of twenty per cent. over either of those roads for the transportation of the mails, and such reduction ought not to be made, aside from the question of the violation of an existing contract.

"The Chicago, Iowa and Nebraska, and the Cedar Rapids and Missouri

River R. R's are both leased to the Chicago and Northwestern Railway Company, but they are both independent organizations, each receiving a certain percentage of the gross earnings of its road for the use thereof, and the Chicago and Northwestern Railway Company receives a certain percentage of the gross earnings for operating.

'The rule adopted by your department seems to me to be open to to these objections:

"1. It is a violation of the contract now existing, which I am sure the department does not intend to do, and which it has no power to do, according to the opinion of its own legal adviser."

And on or about the 25th day of October, 1876, the said solicitor appeared before the Postmaster-General, and orally protested in behalf of the claimants against the right of the department to make any reduction from the pay as specified in said contracts, and on the 16th day of March, 1877, the said general solicitor of the claimants, acting for them, again protested in writing as follows:

"The railway company, while admitting that the deduction of twenty per cent. upon compensation for weight of mails upon the land-grant roads, upon which mails are carried by contract, is in accordance with the construction placed upon the act of July 12, 1876, desire to protest against the application of the act in violation of existing contracts; and for the purpose of saving its rights in the premises it respectfully asks that compensation be paid to it for carrying the mails over the routes above specified in accordance with the terms of the contracts, severally, under which the service has been performed.

"Very respectfully, your obedient servant,

"B. C. COOK,

"*General Solicitor Chicago & Northwestern R. R. Co.*"

V.

On the 29th day of July, 1878, the Second Assistant Postmaster-General sent the following circular to the claimants:

"No. 2510.

"(CIRCULAR.)

"*Readjustment of pay for mail service on railroad routes, under act of Congress of June* 17, 1878.

"POST-OFFICE DEPARTMENT,
"OFFICE OF THE SECOND ASSISTANT POSTMASTER-GENERAL,
"*Washington, D. C., July* 29, 1878.

"SIR: The act of Congress making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-nine, and for other purposes, approved June 17, 1878, contains the following proviso, namely:

"'That the Postmaster-General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-eight, for transportation of mails, by reducing the compensation to all railroad companies for the transportation of mails five per centum per annum from
23 the rates for the transportation of mails, on the basis of the average weight fixed and allowed by the first section of an act

entitled "An act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes," approved July twelfth, eighteen hundred and seventy-six.'

"Therefore, please take notice that the Auditor of the Treasury for this department has been directed to decrease the pay of your company for the conveyance of mails on route 23003, between Chicago and U. P. Transfer, from July 1, 1878, to June 30, 1879, $2,384.70 per annum, leaving the pay from the first-named date $115,194.30 per annum, being a reduction of five per centum from the rates fixed for weight of mails, in accordance with the provisions of the act of June 17, 1878, above quoted.

"Very respectfully, your obedient servant,

"THOS. J. BRADY,
"*Second Assistant Postmaster-General.*

"To ALBERT KEEP, Esq.,
"*Pres. Chicago and Northwestern R. R. Co., Chicago, Ill.*"

And at the same time sent the claimants similar notices as to the said routes between Chicago and Green Bay, and between Fort Howard and Ishpeming.

VI.

On the 7th day of August, 1878, the general solicitor of the claimants, on behalf of the claimants, replied by letter to said circulars, in which letter he stated as follows:

"I desire on behalf of this company to respectfully protest against the action of the department in changing the contract price in each of these cases, and especially to inquire whether it is claimed by the department that it has the right to reduce the contract price over routes where there is no land-grant, or whether it is supposed that route 27038 has received a land-grant, or whether that part of the route 23003 between Chicago and Cedar Rapids is a land-grant road.

"Yours, respectfully,

"B. C. COOK,
"*General Solicitor R.*"

VII.

The railroad from Cedar Rapids to Union Pacific Transfer, a distance of 270 miles, part of said railway mail-route between Chicago and Union Pacific Transfer, and the said railroad between Fort Howard and Ishpeming, a distance of 181⅓ miles, and that portion of the said railroad between Chicago and Green Bay which lies between Fondulac and Green Bay, a distance of 66½ miles, severally received grants of public lands from the United States to aid in their construction.

VIII.

The claimants, during the term of said contracts, were the lessees, but not the owners, of said road between Cedar Rapids and Union Pacific Transfer.

IX.

The following sums have been deducted by the Post-Office Depart-

ment from the amounts agreed to be paid, as specified in the said contracts, and are withheld by the United States from the claimants, viz:

"Route 24031, between Fort Howard and Ishpeming.

"Deduction has been made from the compensation of the company, under the 1st and 13th sections of the act of July 12, 1876, from July 1, 1876, to June 30, 1879, at the rate of $4,543.56 per annum, making, for the period stated, $13,630.68.

"Deduction has also been made from the compensation of the company, under the act of June 17, 1878, from July 1, 1878, to June 30, 1879, at the rate of $584.17 per annum.

24 "Route 25009, between Chicago and Green Bay.

"Deduction has been made from the compensation of the company, under the 1st and 13th sections of the act of July 12, 1876, from July 1, 1876, to June 30, 1879, at the rate of $3,537.80 per annum, making, for the period stated, $10,613.40.

"Deduction has also been made from the compensation of the company, under act of June 17, 1878, from July 1, 1878, to June 30, 1879, at the rate of $454.86 per annum.

"Route 23003, between Chicago and Union Pacific Transfer.

"Deduction has been made from the compensation of the company, under the 1st & 13th sections of the act of July 12, 1876, from July 1, 1876, to June 30, 1879, at the rate of $18,547.70 per annum, making, for the period stated, $55,643.10.

"Deduction has also been made from the compensation of the company, under the act of June 17, 1878, from July 1, 1878, to June 30, 1879, at the rate of $2,384.70 per annum."

X.

During the said term from July 1, 1875, to June 30, 1879, the daily average weight of the mails upon the said route between Chicago and Union Pacific Transfer increased sixty thousand six hundred and eight and two-thirds pounds (60,608⅔ lbs).

XI.

The sum of $876 was deducted by the Post-Office Department from the contract rate of the claimants' compensation for their services from the 1st to 12th July, 1876.

And upon the foregoing findings of fact the court decides as its conclusion of law:

The claimants are entitled to recover judgment for the reduction set forth in finding XI, and for no other sum whatever.

V.—*Opinion of the court.*

NOTT, J., delivered the opinion of the court:

The material facts of this case are simply these: (1.) That the claimants are the owners and lessees of certain land-grant railroads. (2.)

That in 1872 Congress, by the revised post-office act (17 Stat. L., p. 283), authorized the Postmaster-General to enter into mail transportation contracts with railroads, land-grant roads being neither specially included nor excluded from the operation of the authority. (3.) That in 1875 the Postmaster-General entered into a number of such contracts with the claimants in the usual form and for the period of four years. (4.) That in 1876 Congress, by statute, reduced the rate of all mail transportation, and made a further deduction in the rate of the land-grant roads. (5.) That the claimants protested to the Postmaster-General, but continued to perform the contract service, and to accept the reduced compensation.

It was lately determined, in the Chicago, Milwaukee & Saint Paul Railroad case (14 C. Cls. R., 125), that an act of Congress reducing the rate of mail transportation may operate as a notice under existing mail transportation contracts (wherein the government has a right to discontinue the service on notice), but that it cannot operate retroactively. We regard that principle as settled, and as controlling the present case if it be applicable to it. There are two matters of fact, however, in which this case differs from the preceding one, the first of which is that the present claimants' railway was largely, if not entirely, a land-grant road; the second, that when the reduction was made they protested against it to the Postmaster-General.

For the purpose of determining intelligibly their rights as owners or lessees of a land-grant road, we consider the statute under which they acquired a portion of the public lands as a grant, and themselves as beneficiaries under it, who agreed to its terms and hold subject to its conditions.

The controlling condition which now binds the claimants as to land-grant roads which they own, or as to land-grant roads which they have rented, is this: "That the United States mail shall be transported over said roads, under the direction of the Post-Office Department, at such price as Congress may by law direct: Provided, That until such price is fixed by law, the Postmaster-General shall have the power to determine the same." (Act May 15, 1856, 11 Stat. L., p. 9, § 5; act June 3, 1856; ibid., p. 20, § 5.)

After such a grant had been made and accepted, it was of course possible for the parties to rescind it, and by a mutual agreement of like character set it aside and substitute a new contract in its stead; but as there is no act of Congress on the one side thus enacting, and as the grantees on the other side have not reconveyed the lands which they acquired by virtue of the grant, we must consider the original condition as still being the fundamental agreement between the parties, and the obligation to carry the mails at such price as Congress may by law direct as being always operative upon the claimants. It is manifest, therefore, that any agreement entered into by the Postmaster-General for the simple service prescribed by the statute, the transportation of the mail, was nothing more than an exercise of his power to determine the rate of compensation "until such price is fixed by law," and that an agreement made by him for this service for a term of years would be to that extent unauthorized by statute and void. It is likewise manifest that if Congress had authorized the Postmaster-General to enter into such contracts for this statutory service for a term of years, which is claimed to be the effect of the revised post-office act, 1872 (17 Stat. L., p. 283, §§ 212, 256, 265), the agreement, as between the claimants and defendants, considered as contracting parties, would be nudum pactum. The claimants were always bound to do that service at such

rate as Congress might by law prescribe; and if they entered into an agreement to do it for a term of years they undertook nothing more than they were already bound to perform, and gave no consideration which would preclude the other contracting party from changing the rate by fixing the price in the manner prescribed by the still operative terms of the grant. If the provision of the revised post-office act was applicable to land-grant roads, it must be construed to have been an authority to the Postmaster-General to fix the rate of compensation for periods of four years, instead of for shorter or longer periods, but always subject to the original condition of the grant—that Congress might fix the price for the service by law.

But although the condition of the grant that the claimants should carry the mail over their road at such price as Congress might by law direct continued ever obligatory upon the claimants, there were other obligations which they might assume and other services which they might perform than those prescribed by the grant, and these new obligations and services might be the subject of a contract with the Postmaster-General. Such was indeed the case. The contracts upon which the suit is brought imposed duties and obligations beyond the mere transportation of the mails. A separate car or apartment, suitably fitted, warmed, and furnished, was to be provided by the claimants; they were to carry the mails to and from the post-office; they were to transport all agents of the department free; they were to act as collecting agents for the department, receiving the quarterly balance of
26 postmasters along the route, transporting the money and paying it over to the department; and they subjected themselves by their contracts to certain penalties and forfeitures which, they claim, were in excess of any liability imposed upon them by the terms of the grant.

These services and obligations, which might have been the subject of a separate contract, the Postmaster-General combined in the contracts in suit with the statutory obligation of carrying the mail, and but one consideration is expressed for both services, the voluntary under the contract and the involuntary under the grant, and the two are so blended together in the contracts that it is impossible for any court to separate them and say how much of the gross consideration was intended to be for the land-grant railway service and how much for the voluntary obligations and services which the claimants bound themselves to assume and perform. Furthermore, Congress, when dealing with this subject in 1876 (and with full knowledge of the fact that such contracts had been made with the land-grant roads), dealt with the contracts as they existed, and simply directed a reduction of the contract rates as a whole, without fixing in express terms the price which should be paid for the mere service of carrying the mails, as to which their power and discretion were unlimited.

It is therefore, we think, apparent that, so far as these contracts in this suit are involved, the parties stand in precisely the same plight that they would be in if the roads were not land-grant roads and Congress had prescribed this reduction of the contract rate for all railroads. In other words, the claimants were at liberty to throw up their contracts and receive the one month's pay prescribed in case of discontinuance, and fall back upon the simple service of carrying the mail according to the condition of the grant.

But the counsel for the claimants draws a distinction here between this case and that of the Chicago, Milwaukee & Saint Paul Railroad, inasmuch as it is shown here that the claimants protested against the

reduction, while there they apparently acceded to it, and continued to perform without protest.

The answer to this supposed distinction is, we think, twofold:

1st. The protest was given to an agent who had no power to act with discretion in the matter, and whose acts in excess of the statutory notice would not bind his principal. What a man may do by himself he may indeed do by his agent; but it is equally well settled that he cannot be coerced into doing a thing through his agent if he notified the other contracting party that he would not do it, and that his agent had no authority to bind him. Such was the case here. Congress was the principal, the Postmaster-General was their agent, and notice to him in the face of the statute was not notice that could operate in favor of the claimants or bind the government.

2d. The statute ordering a reduction of the contract rate of compensation (as was held in the Chicago, Milwaukee & Saint Paul Railroad case) would operate as a renunciation of the contract, or as a discontinuance of the service under it, unless the other party should assent to the reduction and to that extent enter into a new contract. This was precisely what the claimants did when they continued to perform and accept payment for their services at the reduced rate. The only right which they had when the statute came overriding their contract was to accept the one month's pay prescribed by the contract as liquidated damages for the discontinuance of the service. (Reeside's Case, 8 Wall. R., 38; Garfielde's Case, 93 U. S. R., 242.) No protest could save a right which they did not possess, nor change the terms proffered them
27 for performing if they elected to perform. Having made their election they are bound by it.

But it appears in this case, as in the Chicago, Milwaukee & Saint Paul Railroad case, that the statute directing the reduction was to a certain extent retroactive, and to that extent the claimants should recover.

The judgment of the court is that the claimants recover of the defendants the sum of $876.

28 VI.—*Final judgment.*

At a Court of Claims held in the city of Washington, on the fifth day of April, A. D. 1880, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said The Chicago and Northwestern Railway Company do have and recover of and from the United States the sum of eight hundred and seventy-six dollars ($876.00).

29 VII.—*Application for and allowance of an appeal.*

To the honorable Chief Justice and justices of said court:

The said plaintiff now comes, by its attorney, and prays an appeal from the judgment of the said court to the Supreme Court of the United States.

J. F. FANSWORTH,
Att'y for Plaintiff.

Filed April 5, 1880.

And now, to wit, April 5, 1880, it is ordered that the appeal be allowed as prayed for.

30 In the Court of Claims.

THE CHICAGO AND NORTHWESTERN RAILWAY Company
vs.
THE UNITED STATES.
No. 12063.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application by the claimant for the allowance of an appeal to the Supreme Court of the United States, and the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 19th day of April, A. D. 1880.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 508. The Chicago and Northwestern Railway Company, appellant, vs. The United States. Court of Claims. Filed 10th May, 1880.

REC. 508—3

reduction, while there they apparently acceded to it, and continued to perform without protest.

The answer to this supposed distinction is, we think, twofold:

1st. The protest was given to an agent who had no power to act with discretion in the matter, and whose acts in excess of the statutory notice would not bind his principal. What a man may do by himself he may indeed do by his agent; but it is equally well settled that he cannot be coerced into doing a thing through his agent if he notified the other contracting party that he would not do it, and that his agent had no authority to bind him. Such was the case here. Congress was the principal, the Postmaster-General was their agent, and notice to him in the face of the statute was not notice that could operate in favor of the claimants or bind the government.

2d. The statute ordering a reduction of the contract rate of compensation (as was held in the Chicago, Milwaukee & Saint Paul Railroad case) would operate as a renunciation of the contract, or as a discontinuance of the service under it, unless the other party should assent to the reduction and to that extent enter into a new contract. This was precisely what the claimants did when they continued to perform and accept payment for their services at the reduced rate. The only right which they had when the statute came overriding their contract was to accept the one month's pay prescribed by the contract as liquidated damages for the discontinuance of the service. (Reeside's Case, 8 Wall. R., 38; Garfielde's Case, 93 U. S. R., 242.) No protest could save a right which they did not possess, nor change the terms proffered them
27 for performing if they elected to perform. Having made their election they are bound by it.

But it appears in this case, as in the Chicago, Milwaukee & Saint Paul Railroad case, that the statute directing the reduction was to a certain extent retroactive, and to that extent the claimants should recover.

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29 VII.—*Application for and allowance of an appeal.*

To the honorable Chief Justice and justices of said court:

The said plaintiff now comes, by its attorney, and prays an appeal from the judgment of the said court to the Supreme Court of the United States.

J. F. FANSWORTH,
Att'y for Plaintiff.

Filed April 5, 1880.

And now, to wit, April 5, 1880, it is ordered that the appeal be allowed as prayed for.

30 In the Court of Claims.

THE CHICAGO AND NORTHWESTERN RAILWAY Company
vs.
THE UNITED STATES. } No. 12063.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application by the claimant for the allowance of an appeal to the Supreme Court of the United States, and the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 19th day of April, A. D. 1880.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 508. The Chicago and Northwestern Railway Company, appellant, vs. The United States. Court of Claims. Filed 10th May, 1880.

REC. 508—3

SUPREME COURT, U.S.
FILED
DEC 2 1881

Supreme Court of the United States.

OCTOBER TERM.—1881.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, *Appellant*, *vs.* THE UNITED STATES. } No. 508.

BRIEF FOR PLAINTIFF.

STATEMENT OF THE CASE.

The plaintiff in this case made three several contracts in writing with the Postmaster General for the transportation of the United States mails for a term of four years, beginning on the 1st day of July, 1875, and ending on the 30th day of June, 1879. One over route, No. 23,003, between Chicago and Union Pacific Transfer, at the rate of $131,588 per year, "being $268.00 per mile per annum." Another upon the route, No. 25,009, between Chicago and Green Bay, at the rate of $56,350 per year, "being at the rate of $230.00 per mile per annum," and the third on route, No. 24,031, being Fort Howard, Wisconsion, and Ishpeming, at $16,308 per year, "being at the rate of $90.00 per mile per annum."

Upon the first route, the plaintiff owned the railroad between Chicago and the Mississippi river, 137 miles. It leased the road from the Mississippi river to Cedar Rapids,

a distance of 82½ miles, from the Chicago, Iowa & Nebraska Railroad Company; and from Cedar Rapids to Union Pacific Transfer, a distance of 270 miles, it leased the road from the Cedar Rapids and Missouri River R. R. Company. Upon the other two routes the plaintiff was the owner of the entire road.

The contracts are set out in the record, as found by the Court of Claims.

Payments for the service were to be made at the end of each quarter.

They bound the Railway Company——

First. To transport the mails in a separate car, or apartment of a car, suitably fitted up, furnished, warmed and lighted, under the direction and to the satisfaction of the Post Office Department, and at the expense of the Company, for assorting and safe keeping the mails, and for the exclusive use of the Department and its mail agent; and to convey the agents of the Department, free of charge, and to take the mails from, and deliver them into, the post offices on and at the ends of the routes.

Second. That if the Company should run passenger trains more frequently than the contract required the mails to be carried, it should carry the mails with the same increased frequency, and without increase of compensation.

Third. That the Company should carry, free of charge, all mail bags and post office blanks, and all accredited special agents of the Department.

Fourth. That the Company should not carry out of the mails, any letters not enclosed in postage stamped envelopes, or transmit any commercial intelligence more rapidly than by mail.

Fifth. That in every case of failure to perform a trip, there might be a forfeiture of the pay for the trip, and the failure to arrive at the end of the route, so as to lose connection with a depending mail, should be considered as equal to a whole trip lost.

Sixth. That the Company should be subject to fines for failure to take and deliver a mail, or any part of it, etc., etc.

Eighth. This clause required the Company to collect, quarterly, postmasters' balances, due from them to the United States, etc.

The ninth clause of the contracts provided "that the Postmaster General may discontinue or curtail the service in whole or in part, whenever the public interests, in his judgment, shall require such discontinuance or curtailment, for any cause, he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and a *pro rata* compensation for the amount of service retained and continued."

(Record, pp. 6, 8, 10.)

Those portions of the roads upon the several routes between Cedar Rapids and the Union Pacific Transfer—270 miles—and between Fon-du-Lac and Green Bay, (route No. 25,009,) a distance of 66½ miles, and the road between Fort Howard and Ishpeming, severally received grants of land from the United States, upon the condition that the mails should be transported thereon at such rates as Congress should prescribe, with the further provision, that until Congress should so fix the rates, the Postmaster General should fix them. These grants were made by Congress in the year 1856.

(11 Stat., pp. 9, 20 and 21.)

The claimant carried the mails during the said term of four years in compliance with the said contracts, in all respects according to the terms of the same.

(See 2d Finding of Ct. of Cls., record, p. 12.)

On the 12th day of July, 1876, in the act making appropriations for the service of the Post Office Department, etc., Congress inserted the following provision, viz:

"*Provided*, That the Postmaster General be, and he is hereby authorized and directed to readjust the compensation

to be paid from and after the first day of July, 1876, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates fixed and allowed by the first section of an act entitled 'An act making appropriations for the service of the Post Office Department for the fiscal year ending June 30th, 1874, and for other purposes,' approved March 3d, 1873, for the transportation of mails on the basis of the average weight."

"SEC. 13. That railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such prices as Congress should by law direct, shall receive only eighty per centum of the compensation authorized by this act."

On the 18th day of August, 1876, the Postmaster General notified the railroad companies carrying the mails under contracts with the Department, that their contracts were not affected by the above provision, etc.

(See record, pp. 12, 13—3d Finding Ct. of Cls.)

On or about the 20th day of October, 1876, the Second Assistant Postmaster General, by circulars, notified the claimant that, under said section 13 of the act of July 12, 1876, the Department would reduce the compensation of the claimant for said mail service $26,317.60 per annum, between Chicago and Union Pacific Transfer, and $11,270 per annum between Chicago and Green Bay, and $3,261.60 per annum between Fort Howard and Ishpeming. Said reduction to commence from the first of July, 1876.

(See record, pp. 13, 14—3d Finding Ct. of Cls.)

The claimant, immediately thereafter, through its general solicitor, in a letter to the Second Assistant Postmaster General, objected to that reduction; and on the 25th of October, 1876, the general solicitor of the claimant appeared before the Postmaster General in person, and orally protested, in behalf of the claimant, against the right of the Department to make any reduction from the contract rates. And again, on the 16th of March, 1877, the said general

solicitor of the claimant, in a letter to the Postmaster General protested against said reduction.

(See record, pp. 14, 15—4th Finding Ct. of Cls.)

Nevertheless, from the first day of July, 1876, to the end of the said contract term, the Department made the reductions threatened in said circulars.

The act of Congress making appropriations for the service of the Post Office Department, etc., approved June 17, 1878, contained this provision:

"That the Postmaster General be, and he is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-eight, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails five per centum per annum from the rates for the transportation of mails on the basis of the average weight fixed and allowed by the first section of an act entitled 'An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes,' approved July twelfth, eighteen hundred and seventy-six."

And on or about the 29th day of July, 1878, the Post Office Department notified the claimant, by circulars, that it should further reduce the compensation of the claimant, under the last recited law, for the said transportation of the said mails, from the first day of July, 1878, as follows:

Between Chicago and Union Pacific Transfer, $2,384.70 per annum.

Between Chicago and Green Bay, $454.86 per annum.

And between Fort Howard and Ishpeming, $584.17 per annum.

(Record, pp. 15, 16—5th Finding Ct. of Cls.)

On the 7th day of August, 1878, the claimant, in writing by its general solicitor, protested against the action of the Department in changing the contract price in each of these cases, &c.

(Record, p. 16—6th Finding Ct. of Cls.)

Nevertheless, the said last mentioned reduction was made.

During the said term, from July 1, 1875, to June 30, 1879, the daily average weight of the mails upon the said route, between Chicago and Union Pacific Transfer, increased sixty thousand, six hundred and eight and two-thirds pounds. (60,608⅔ lbs.)

(Record, p. 17—10th Finding Ct. of Cls.)

The total amount deducted from the contract rates by the Post Office Department, upon the three routes, aggregated eighty-three thousand, three hundred and ten dollars and ninety-one cents, ($83,310.91,) for which this suit was brought.

(Record, pp. 16, 17—9th Finding Ct. of Cls.)

The Court of Claims gave the plaintiff judgment for the sum of eight hundred and seventy-six dollars. ($876.)

Assignment of Error.

The appellant assigns for error in the judgment of the Court of Claims, that its judgment should have been for the sum of eighty-three thousand, three hundred and ten dollars and ninety-one cents. ($83,310.91.)

Brief of Argument.

First. The Postmaster General had ample authority to make the contracts with the plaintiff.

The authority is expressly given by the Statutes.

Section 265 of the act of June 8, 1872, "to consolidate the laws relating to the Post Office Department," etc.,—being *Section* 3942 *of the Revised Statutes*—says:

"The Postmaster General may enter into contracts for carrying the mails with railroad companies without advertising for bids therefor."

Sec. 212 of the same act—*Sec.* 3999 *of the Revised Statutes*—provides:

"If the Postmaster General is unable to contract for carrying the mail on *any railway route* at a compensation not exceeding the maximum rates herein provided, or for what he may deem a reasonable and 'fair compensation' * * he may contract for carrying letter mail by horse express or otherwise," etc.

Sec. 256, same act—3956 *Revised Statutes*—limits the time of contracting to four years in all cases, except contracts for carrying the mail on the sea, which are limited to two years.

The provisions of the act of March 3, 1873,—*Sec.* 4002, *Revised Statutes*—which was the latest Statute bearing upon the subject when these contracts were made, authorized and directed the Postmaster General to readjust the compensation thereafter to be paid for the transportation of the mails on railroad routes upon these conditions, viz.:

First. "That the mails shall be conveyed with due frequency and speed, and that sufficient and suitable room, fixtures and furniture in a car or apartment, properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails."

Second. "That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of 200 pounds, $50; 500 pounds, $75; 1,000 pounds, $100; * * the average weight to be ascertained * * by the actual weighing of the mails * * not less frequently than once in every four years," etc.

Sec. 4004 authorized additional compensation of from $25 to $50 per mile per annum to railway companies that should furnish a daily trip each way of railway post office cars, etc.

These provisions of the Statutes, taken together, fixed the maximum rates which should be paid on *all* "*railway routes*," and authorized contracts to be made with the railroad companies, by the Postmaster General, without advertising, for a term not exceeding four years; and to require of railway companies, with which contracts should be made, the performance of certain conditions and services, (described in the

first clause of *Sec.* 4002,) in addition to the mere transportation of the mails.

In the court below, the only questions discussed by the briefs and arguments of the attorneys, on either side, were as to the binding force of the contracts upon the "land grant" portions of the railroads over which the mails were transported, and the right of Congress, during the existence of the contracts, to change the rates for such transportation.

It was not there claimed by the attorney for the Government that the ninth clause of the contracts gave Congress any authority to interfere or change the price to be paid for the service, as it was well known that in all cases of contracts, for the conveyance of the mail upon roads not "land grant," the Postmaster General continued to pay the contract price.

The Court of Claims held that these contracts were as valid and binding upon the "land grant" as the non-land grant portions of the roads, for the reasons:

First. That the contracts required the company to do many other things—which were necessary in the proper administration of postal affairs—besides the mere carrying of the mails; and,

Secondly, Because Congress did not, in the act of 12th of July, 1876, or in the act of 1868, "fix the rates which should be paid for carrying the mails upon 'land grant' roads." To which reasons we add these:

That the contracts are for carrying the mails over "mail routes" for a certain annual compensation; and only part of these "routes" are "land grant" railroads and part not.

Secondly. That by the acts of 1872 and 1873 Congress did fix the maximum rates for all railroads, (including "land grant,") and authorized the Postmaster General to make contracts for four years.

The Court of Claims say, in the opinion delivered by Mr. Justice Nott in this case:

"It is, therefore, we think, apparent, that so far as these contracts in this suit are involved, the parties stand in pre-

cisely the same plight that they would be in if the roads were not "land grant" roads and Congress had prescribed this reduction of the contract rate for all railroads. In other words, the claimants were at liberty to throw up their contracts, and receive the one month's pay prescribed in case of discontinuance, and fall back upon the simple service of carrying the mail, according to the condition of the grant."

But the contracts nowhere gave the *claimants* the right "to throw up their contracts and receive the one month's pay prescribed in case of discontinuance."

The Court of Claims further say:

"The Statute ordering a reduction of the contract rate of compensation would operate as a renunciation of the contract, or as a discontinuance of the service under it, unless the other party should assent to the reduction and to that extent enter into a new contract. This was precisely what the claimants did when they continued to perform and accept payment for their services at the reduced rate. The one right which they had when the Statute came, over-riding their contract, was to accept the one month's pay prescribed by the contract, as liquidated damages for the discontinuance of the service. No protest could save a right which they did not possess, or change the terms proffered them for performing, if they elected to perform."

Now, it is humbly submitted, that the contracts in this case nowhere gave the plaintiff any right whatever to abandon the service without the consent of the Postmaster General; that he alone could discontinue the service. And that the statute which ordered a reduction of rates generally, did not "*override* the contracts." It was not intended to and it could not affect contracts in existence at the time.

Had the statute ordered a "discontinuance of the *service*, in whole or in part," the Postmaster General might, *under the contracts*, have *executed* the law, and then the Company would have been thrown back upon the one month's extra pay.

But there has been no discontinuance of the service, or any part of it, or any desire or intention on the part of the Postmaster General or of Congress to do so.

The cases of Reeside and Garfield referred to by Mr. Justice Nott are not in point.

Reeside's Case, 8*th Wall.*, was this: Before the war, Reeside had a contract for carrying the mail, in some insurrectionary States, with a clause in his contract like the ninth clause in the contracts in this case. In May, 1861, the Postmaster General suspended the *service* under his contract, paying him to the 1st of June, 1861. Congress, in February, 1861, authorized the Postmaster General to discontinue the service wherever it could not be safely continued, etc. Reeside sued in the Court of Claims for one month's extra pay. The Court of Claims dismissed his petition. On appeal, this court held that he was entitled to the month's pay, and reversed the decision of the Court of Claims.

In delivering the opinion of this court in that case, Mr. Justice Nelson said, referring to the act of February, 1861: "*But this act had no effect to control the legal import of the contracts, nor did it confer any greater power than he, the Postmaster General, possessed under them.*"

Garfield's case was this: The Postmaster General advertised for proposals, and Garfield proposed to carry the mail between Port Townsend and Sitka. The proposal was accepted, but the contract was not signed, and before service began the Postmaster General annulled his acceptance of Mr. Garfield's proposal, and established a service between *Portland* and Sitka instead, contracting with another party.

This court held, that the proposal and acceptance constituted a contract, but that under the regulations of the Department authorizing the Postmaster General to discontinue service on any route, it could be annulled, and that Garfield was entitled under the same regulations to a month's pay.

The Chicago, Milwaukee and St. Paul Railroad case, (14 *Ct. Cls., R.* 125,) referred to by Mr. Justice Nott, was a suit brought by that Company, who claimed that a portion of its road over which the mails were being carried under contract, and which the Postmaster General had regarded as "land grant" road, was not, in fact, "land grant;" and that

was supposed to be the principal question involved in the case, as the Postmaster General had not claimed the right to reduce the pay upon any except land grant roads.

The Court of Claims decided in favor of the claim of the company, that the road was not "land grant," but held, as a "conclusion of law," that the Postmaster General had a right to reduce the compensation paid to the company, ten per cent. after July 12, 1876. But the court said: "But such readjustment could bind the claimant only when expressly or tacitly assented to by them;" and as in that case there was no proof that the railway company objected or protested *at the time* against such reduction, (though it brought suit soon afterwards and during the contract,) the Court of Claims decided against the reduction which the Postmaster General had made and allowed one that he never claimed. That case was appealed, and is now at the bar of this court.

While we by no means admit that an actual protest or objection on the part of the company was necessary, or that one party to a contract can change its terms, unless the other party objects to such change, still in this case the plaintiff, both in writing and orally, did object, both in 1876 and in 1878, and protest against each of the reductions made by the Postmaster General.

The Court of Claims say: "The protest was given to an agent, who had no power to act with discretion in the matter," etc.

And again: "Congress was the principal—the Postmaster General was their agent, and notice to him, in the face of the statute, was not notice that could operate in favor of the claimants, or bind the Government."

The Post Office Department is one of the executive departments of the Government. The statute authorized the head of that Department to make the contracts in this suit. Congress was informed by the Postmaster General of the execution of these contracts.

The only possible way provided in the contracts for ter-

minating them or in any manner changing them, was by "*discontinuing the service*," and that could only be done by the Postmaster General himslf; in the exercise of his own "*opinion*" that "the public service" would be benefitted by such discontinuance. *He was the arbiter in the matter.*

It is difficult to conceive to whom or in what manner the plaintiff could have given an effectual notice, if not to the Postmaster General.

Must a party hunt up the several members of Congress, in their respective States, to give them notice?

The Court of Claims say, that the moment the act of July 12, 1876, was passed, it was a notice to the plaintiff to stop transporting the mails, and sue the Government for a month's extra pay!

Suppose the plaintiff had done so while the Postmaster General was insisting that the mails should be carried, what sort of figure would the plaintiff cut in such a suit? And especially as the plaintiff would have been met by a sound construction of that act of Congress, made by the Attorney General of the United States, seconded by the Assistant Attorney General of the Post Office Department, and adopted and promulgated by the Postmaster General himself.

The Postmaster General submitted *one of the contracts in this suit* to the Attorney General, and asked his opinion whether the act of July 12, 1876, applied to those corporations with which contracts were still subsisting. His reply was: "In my opinion, Congress did not intend to have this effect." He further said: "The contracts * * * were authorized by the law in force at the dates of their execution. They bound both parties. A breach of them by either would subject the delinquent to a claim for damages," etc.

(See 15th Vol. Opinions of Attorney General, p. 182.)

The Postmaster General, on the 18th of August, 1876, by circular, notified the plaintiff that the Assistant Attorney

General for the Post Office Department had advised to the same tenor.

(See 3d Finding Ct. Cls.—record pp. 12, 13.)

"The Postal Laws and Regulations of the United States of America," which were printed agreeably to an act of Congress, approved March 3, 1876, after quoting the provisions of the act of July 12, 1876, directing a reduction of ten per centum, etc., say: "*This act was not intended to affect existing contracts.*"

(pp. 150 and 151 of said Vol.)

The law authorized the Postmaster General to go to the Attorney General for a construction of a doubtful statute, and in such case the Attorney General's direction would be a protection to the Postmaster General; but the Court of Claims seemed to think that the claimant in this case should have been wiser than the Attorney General, the Assistant Attorney General for the Post Office Department, and the Postmaster General; and that when they told the claimant that its "contracts were not affected by the act of July 12, 1876," and that the Company should keep on performing its contracts, it should have thrown them up, thrown the mails off its cars, and sued the Government for a month's extra pay!

The Court of Claims confound readjustment of *pay* with readjustment of *service*.

Congress did not direct the Postmaster General to "readjust" the *service*, but the "compensation" *for* the service. And the ninth clause of the contract itself requires payment at the contract rates "*for the amount of service retained and continued.*"

All the service provided in the contracts was "*retained and continued.*" Why? Because, in the "*opinion*" of the Postmaster General, "*the public interests required*" *such continuance.* The plaintiff did not request its continance—had no voice in the matter.

Forcible "*readjustment of pay*" by *one party* is "*repudiation,*" *and is unlawful and dishonest.*

The Statute authorizes Congress to terminate contracts for carrying the mails between this and foreign countries.

(Rev. St., Sec. 4011.)

But *these* contracts could be terminated only by the Postmaster General, and for but two reasons, viz.:

First. If, in his opinion, the public service required a discontinuance of those mails, (as provided in the contracts.)

Second. For violations of the terms of the contracts by the Railway Company.

The reduction of the pay for the service under these contracts was unjust as well as illegal.

The Government had always been anxious to obtain contracts with railroad companies for the transportation of the mails for the term allowed by law, (four years,) because it could in that manner bind the railway companies to furnish facilities, viz.: Cars properly fitted and of the proper dimensions; such number of trips daily or weekly as might be required, and to the performance of the various extraordinary services which are named in the contracts.

By these means, also, a frequent weighing of the mails was dispensed with; and, though the mails should increase ever so much during the term, there could be no claim made for increase of compensation, etc. So desirable was it to obtain contracts that Congress at one time authorized the Postmaster General to pay those companies which should enter into contracts for the transportation of the mails fifty per cent. more than for like service without contracts.

(See Vol. Stat. at Large, p.)

Yet but few companies entered into contracts with the Postmaster General, because of the extra service and disabilities which such contracts would impose upon them.

In this case—as will be seen by the Tenth Finding of the Court of Claims, on page 17 of the record—upon one of the

contract routes, viz., between Chicago and Union Pacific Transfer, the increase in the weight of the mails during the term was over sixty thousand pounds.

But for the contract, the claimant could have had a reweighing of the mails from time to time; and, under the provisions of Sec. 4002 of the Revised Statutes, the compensation for transporting this additional weight of mails would have amounted to more than the reduction upon that route.

There was no proof as to the other routes in this particular, but it is safe to presume that on nearly all Western railroad mail routes the mails constantly and rapidly increase.

J. F. Farnsworth,
Attorney for Appellant.

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In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY
vs.
THE UNITED STATES.
} No. 508.

BRIEF FOR THE UNITED STATES.

This was an action by a *land-grant* railway company to recover certain deductions from its pay for postal services made by the Postmaster-General, under the act of 1876, ch. 179 (*Richardson*, p. 224), §§ 2 and 13.

The government adopts as its brief and argument the satisfactory opinion of the learned court below.

S. F. PHILLIPS,
Solicitor-General.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 194.

THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

No. 195.

THE UNITED STATES, APPELLANT,

vs.

THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY.

APPEALS FROM THE COURT OF CLAIMS.

FILED JUNE 6, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 194.

THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

No. 195.

THE UNITED STATES, APPELLANT,

vs.

THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY.

APPEALS FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Traverse	4	2
Findings of fact and conclusions of law	5	2
Opinion of the court	12	10
Final judgment	16	14
Application of claimant for and allowance of appeal	17	14
Application of defendants for and allowance of appeal	18	14
Certificate	19	15

1 I. *Petition.—Filed Feb.* 14, 1878.

In Court of Claims of the United States.

THE CHICAGO, MILWAUKEE, AND ST. PAUL Railway Company
vs.
THE UNITED STATES.

To the honorable justices of the Court of Claims:

The Chicago, Milwaukee and St. Paul Railway Company respectfully represents:

First. That it is a corporation duly organized under the laws of the State of Wisconsin, and having its principal place of business in the city of Milwaukee.

Second. That said company is the owner of a railway extending from the city of Milwaukee to the city of La Crosse, in the State of Wisconsin, and is engaged in operating the same, and that the United States mail route 25,002 extends from the said city of Milwaukee to said city of La Crosse over said railway.

2 Third. That on or about the first day of July, A. D. 1875, the said United States (acting by their Postmaster General) entered into a written contract with said Chicago, Milwaukee and St. Paul Railway Company, whereby said company agreed to carry the United States mail over said route 25,002, from Milwaukee to La Crosse, on said railway, twelve times per week each way, for the period of four years from July first, 1875, for the consideration of $244 per mile per annum, including $25 per mile per annum for railway post-office cars, which said amount the United States agreed to pay for said service.

Fourth. That said Chicago, Milwaukee and St. Paul Railway Company has faithfully kept and performed said contract, in all respects, since said first day of July, 1875, and transported said mails as therein provided, except that the United States discontinued railway post-office cars from Portage to La Crosse, thereby reducing the compensation to be paid for that distance $25 per mile per annum, to wit, $219 per mile per annum.

Fifth. That since the first day of July, 1876, the said United States have refused to pay to the said Chicago, Milwaukee and St. Paul Railway Company the sum of $219 per mile per annum, according to the terms of said contract for that portion of said route 25,002, lying between Portage City and Tomah, a distance of 61.6 miles, but have only paid therefor the sum of $157,68 per mile per annum, from said first day of July, 1876, instead of the price named in said contract,

Sixth. That, as the said Chicago, Milwaukee and St. Paul Railway Company is informed and believes, said deduction from said contract price is made on a claim that said railway from Portage City to Tomah "was constructed, in whole or in part, by a land grant made by Congress on the condition that the mails should be transported over the same at such prices as Congress should by law direct," but said company expressly denies that said railway, or any part or portion thereof, was so constructed, and further denies that it is a land grant road so called.

Seventh. That there is due and unpaid to the said company, from the United States, for said services in the transportation of the said mails, under said contract, the sum of five thousand nine hundred and eighty $\frac{74}{100}$ dollars ($5,980\frac{74}{100}$), and the said company is justly entitled

to that amount, after allowing all just credits and offsets, and the said company prays judgment for the same.

3 The complainant further states that no assignment or transfer of the foregoing claim of the said company against the United States, or any part thereof, or any interest therein, has been made, and that the same belongs to the said company.

JOHN W. CARY,
Attorney for Complainant.

EASTERN DISTRICT OF WISCONSIN, *ss:*

Alexander Mitchell, being duly sworn, deposes and says that he is a resident of the city of Milwaukee, and president of the said Chicago, Milwaukee and St. Paul Railway Company; that he has read the foregoing petition and that he believes the same to be true.

ALEX. MITCHELL,
Pres't Chicago, Milwaukee and St. Paul R'y.

Subscribed and sworn to before me this seventh day of February, 1878.

[SEAL.] MELBERT B. CARY,
Notary Public, Milwaukee Co., Wis.

The post-office address of the complainant is Milwaukee, Wisconsin; post-office address of its attorney, Milwaukee, Wisconsin.

4 II. *Traverse.—Filed Feb.* 19, 1878.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

5 *Findings of fact and conclusions of law.—Filed March* 3, 1879.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. On the 11th October, 1856, the State of Wisconsin granted by statute to the La Crosse and Milwaukee Railroad Company all the interest and estate then present or prospective of the State in and to any of the lands granted by the United States to the State of Wisconsin by the act of June 3, 1856, for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of Portage City, to the Saint Croix River or Lake, between townships 25 and 31, and from thence to the west end of Lake Superior and to Bayfield; and directed the governor of the State, whenever twenty miles of said road should be completed, to certify the same to the Secretary of the Interior, and to execute and deliver to the said company, on behalf of the State, and under its great seal, whenever it should become entitled to any of said lands, a deed in fee-simple of any and all to which it should become en-

titled. The said grant was made on condition that the land should be exclusively applied in the construction of the road for which it was granted and selected, and should be disposed of only as the work progressed, and should be applied to no other work whatever.

II. A part of the road of said company, as constructed by them, namely, 61.6 miles thereof, between Portage and Tomah, was upon the line contemplated by and set forth in said act of June 3, 1856; but so much of the railroad contemplated by said act as was north and west of Tomah, and so much as was south and east of Portage, were never constructed by them. They laid claim to so much of the lands granted by the act of June 3, 1856, as were applicable to three sections of twenty miles each of said road between Portage and Tomah, which they said had been constructed by them in conformity with the provisions of said act, and with the provisions of the act of the State of Wisconsin.

On the 28th December, 1857, the then governor of the State of Wisconsin certified to the Secretary of the Interior that the said company was authorized to construct the railroad on the line set forth in the act of June 3, 1856, and that it had constructed forty miles on what is now the line between Portage and Tomah, and that the same was a part of the line mentioned in said act; but his successor in office, on the
6 4th February, 1858, informed the Secretary that there were grave doubts whether the said company had fulfilled the conditions which would entitle it to the certificate, and requested him not to issue to it patents for any of the lands granted by the act of June 3, 1856. In pursuance of this request all action in the matter was suspended by the General Land Office of the United States and the Department of the Interior The said company has never had patents for any part of said lands, and has never received a deed of any part thereof from the State of Wisconsin, and has never become possessed of any part thereof.

III. The road of said company, as constructed by them, contained many miles of railroad in addition to the said 61.6 miles; but, with the exception of said 61.6 miles, no part of their road was upon the line contemplated by said act of June 3, 1856. After the completion of the road to Tomah, repeated applications were made by said company to the governor of Wisconsin to grant the necessary certificate to the Secretary of the Interior to enable the said company to obtain said lands, and to withdraw his objections to the granting of patents on the certificate made by his predecessor; but he at all times refused to comply with such request, on the ground that the said company was not entitled to said certificates, for the reason that it had not complied with the conditions of the act of the legislature of the State of Wisconsin in conferring said grant upon said company, in that it had not commenced the construction of said road at Madison and at Columbus; and in that it had not built and constructed the roads from Madison to Portage City, and from Columbus to Portage City. Said company also applied to the Department of the Interior at Washington, on proof of the completion of said road from Portage City to Tomah, and the refusal of the governor to certify thereto, to grant said lands to said company, without further action of the governor of Wisconsin, to which application the Secretary of the Interior made the following reply by letter addressed to the president of the company:

"Your inquiries relate to the railroad 'from Madison, by way of Portage City, to the St. Croix River or Lake,' the location of which, under the law of Congress of June 3, 1856, has heretofore been made

and accepted as the basis of the adjustment of the grant to the State, so far as pertains to said road; and I have to inform you in reply that the certificate of Governor Bashford, dated the 28th of December, 1857, has been filed in this department that forty continuous miles of said road have been completed, extending from the intersection of Portage City, in the county of Columbia, westwardly to a point on said road four and $\frac{46}{100}$ miles east of the depot at New Lisbon, in the county of Juneau.

"You have also inquired whether, upon the refusal of the governor of the State of Wisconsin to furnish certificates of the completion of any section or sections of said road of the length of twenty continuous miles, this department will receive other evidence of the fact of such completion.

"By the location of the route or line of road which has been accepted by the State and the United States as the basis for the severance of the lands falling to the State from those reserved to the United States, the granted lands are vested with a condition that the lands shall be disposed of by the State in a particular manner. (See sec. 4th of the act of Congress.)

"Should any section or sections of the line of said road of twenty continuous miles be completed and the governor fail or refuse to certify to such completion, his failure or refusal would not be the basis of any action of this department at any time prior to the expiration of ten years, for by the last clause of the 4th section of the law of Congress it is enacted that 'if said roads are not completed within ten years * * the land unsold shall revert to the United States.'

"Your remaining inquiry will be answered by the remark that the proper certificate of the governor of the State, respecting the completion of 'any twenty continuous miles' of the road, will be received and filed in reference to the specific 'twenty continuous miles' of the road which may be described in such certificate.

"Premising that it is not the practice of the department to respond to general inquiries, or to inform parties who may have an interest in advance what will be its action under certain supposed or probable circumstances, these opinions are expressed to you in view of the state of facts now existing in the particular case communicated to this department and the General Land Office verbally and in writing by the governor of the State of Wisconsin, and by yourself as the president of the company whose railroad, over the located route from Madison, by way of Portage City, to the St. Croix River or lake, is now in process of construction."

IV. By a deed of trust dated December 31, 1856, the said company mortgaged their road and its rolling-stock, and—

"All and singular the lands granted or intended to be granted to said railroad company under and by virtue of said act of Congress and the act of the legislature of Wisconsin hereinbefore mentioned, so far as the said lands pertain or are applicable to the construction of said roads from Madison, by way of Portage City, to the St. Croix River or Lake, estimated to be about one million of acres of land, * * as fully and as amply as the same might be conveyed if the said railroad had been already constructed and equipped, and the particular lands granted by Congress and the legislature, so far as the same were applicable to the construction of said road from Madison to St. Croix River or Lake, had already been designated and conveyed to said railroad company."

The grantees in the deed were Green C. Bronson, James T. Soutter,

and Shepherd Knapp, trustees, and the debt which it was proposed to secure by the mortgage was an issue of the bonds of the company not to exceed ten millions of dollars.

On the 8th day of July, of 1859, the said trustees made application to the Secretary of the Interior for patents for lands applicable under the act of June 3, 1856, to said completed sections between Portage and Tomah. In their said application they said:

"Congress granted the land to the State of Wisconsin; the State granted to the railroad company, and the company to the trustees. The equitable, if not the legal, title is in them in trust for the bondholders."

To this application the Secretary made a reply, from which the following is an extract:

"Several of the matters to which my attention is thus invited were before me in August, 1858, and under date of the 5th of that month I addressed a communication to N. P. Stanton, esq., the president of the La Crosse and Milwaukee R. R. Co., which explains the position of this department in reference to the controversy between the executive of the State and the railroad company. A copy of that communication is enclosed for your information. It seems to be unnecessary to add much to what is there said in order to reply to all your propositions. It is deemed proper, however, to remark that the act of Congress of June 3d, 1856, which is the basis of the action of this department in the case, has made a grant or grants to the State of Wisconsin, and it has been the uniform practice in adjusting similar grants in the General Land Office to transact the business directly with the State authorities and with them alone.

Parties who seek the recognition or completion of the title of the State to any particular lands, must therefore obtain the intervention of the State officers; and it is not necessary for us to entertain or consider questions which arise upon State legislation concerning the lands; questions which appear to be more appropriate for the State authorities or the courts. This position is more manifestly proper when it is considered that in the received construction of existing laws of Congress a patent is entirely unnecessary to assure the title of the State to any of the lands granted by Congress for aid in constructing railroads. These grants are accepted by the States with conditions, and so long as those conditions are complied with by the States the title of a State to any granted tracts will be duly respected by all the officers of this department."

The said trustees never received patents for any part of said lands, and have never received a deed for any part thereof from the State of Wisconsin, and never became possessed of any part thereof.

8 V. There being a default in the payment of interest on said mortgage debt, a suit was instituted in the district court of the United States for the district of Wisconsin for the foreclosure of the mortgage. At the January term, 1862, a decree was entered in said suit for the sale of the property and estate conveyed by said deed of trust, and the same, including all the said lands described in the same language set forth in finding IV, were sold at public auction to William Wallace Pratt and William Henry White, they being the highest and best bidders therefor, and a good and sufficient deed to convey to said purchasers the property and estate so mortgaged, sold, and purchased, including the said lands described as aforesaid, was executed and delivered to them on the 5th day of May, 1863. But the said purchasers never received patents for any part of said lands, and never received a

deed for any part thereof from the State of Wisconsin, and never became possessed of any part thereof.

VI. The claimants are a corporation duly organized under the laws of the State of Wisconsin. On the 5th day of May, 1863, said Pratt and White, by deed duly executed and delivered, conveyed to the claimants all the said railroad and other property and estate so purchased by them, and also, by words of description in all respects similar to those set forth in finding IV, all the said lands so purchased by and conveyed to them. The claimants entered into possession of the said railroad and have since controlled and operated it; first under their corporate name of the Milwaukee and Saint Paul Railway Company, and subsequently and still under the corporate name in which they sue in this action; but they have never become possessed of the said lands or of any part thereof, or of any proceeds therefrom, and they have never received any patents for any part of said land, nor any deed from the State of Wisconsin of any part thereof.

On the 20th day of June, 1863, they made application in writing to the then governor of Wisconsin, setting forth that they had succeeded by virtue of the foreclosure of said mortgage to all the right and title which was conveyed by said mortgage to said Bronson, Soutter, and Knapp, trustees in the lands granted by Congress by the act of June 3, 1856, and by the aforesaid act of the legislature of the State of Wisconsin of October 11, 1856, to the said La Crosse and Milwaukee Railroad Company, and requesting him to issue to them the proper certificates for the land to which they had thereby become entitled by virtue of said trust-deed, said foreclosure proceedings, and said purchase. In response thereto the governor answered that he had examined the matter and was of the opinion that the construction of said act of Congress and of the legislature of Wisconsin was correctly made by his predecessor, and that he adhered thereto, and refused to grant to the claimants the necessary certificate to obtain said lands, and refused to recognize their right thereto, for the reason that they had not complied with the terms of said grant.

VII. On the 6th of March, 1868, the State of Wisconsin, in order that parties who had given mortgages to aid in the construction of the La Crosse and Milwaukee Railroad and the Milwaukee and Horicon
9 Railroad might receive all the benefits which they could from said lands, gave its consent that the said lands might be used, donated, and applied to and for the use and benefit of said mortgagors; and also named certain commissioners who should be authorized to receive, take, hold, bargain, grant, sell, and convey all the lands granted by the said act of June 3, 1856, and convert them into money at such times and on such credits as should best subserve the interests of such parties; and incorporated the Wisconsin Railroad Farm Mortgage Land Company for these purposes.

On the 15th September, 1868, Congress having in the mean time authorized the State to dispose of the lands due the State for the portion of the road already completed for the benefit of the said Wisconsin Railroad Farm Mortgage Land Company, the claimants executed and delivered to the said land company a deed in the words and figures following, to wit:

"This indenture, made this 15th day of September, A. D. 1868, between the Milwaukee & St. Paul Railway Company, of the first part, and the Wisconsin Railroad Farm Mortgage Land Company, party of the second part, witnesseth:

"Whereas the Congress of the United States, by an act granted June

3d, 1856, entitled 'An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State,' granted to the State of Wisconsin certain lands to aid in the construction of a railroad from Madison or Columbus (by the way of Portage City) to the St. Croix River or Lake;

"And whereas the legislature of said State of Wisconsin subsequently passed an act, approved October 11, 1856, entitled 'An act to grant certain lands to the La Crosse and Milwaukee Railroad Company, and to execute the trust created by an act of Congress entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," approved June 3, 1856,' by which said State of Wisconsin granted to the La Crosse and Milwaukee Railroad Company all of said lands so granted by the said Congress of the United States to the said State of Wisconsin for the purpose of aiding in the construction of a railroad from Madison or Columbus, by the way of Portage City, to the St. Croix River or Lake, between townships 25 and 31, and from there to the west end of Lake Superior and Bayfield, together with all and singular the rights, privileges, and immunities, either present or prospective, conferred, or intended to be conferred, by the said act of Congress;

"And whereas said La Crosse and Milwaukee Railroad Company, after the passage of said last-mentioned act, and on the same day, duly accepted the same, by a resolution adopted by the board of directors of said company, a copy of which, certified by the secretary of said company under its corporate seal, was on the same day deposited in the office of the secretary of state;

"And whereas the said La Crosse and Milwaukee Railroad Company afterwards, and on the 31st day of December, A. D. 1856, for the purpose of borrowing money to enable it to build said railroad, issued its bonds, secured by a deed of trust, executed by said railroad company, covering its line of proposed road from Madison, by way of Portage City, to the St. Croix River or Lake, and in and by said deed of trust said La Crosse and Milwaukee Railroad Company conveyed to Green C. Bronson, James T. Soutter, and Shepherd Knapp, trustees therein named, all such interest as said railroad company had then acquired, or might thereafter acquire, in all the lands granted to said railroad company by the said act of the legislature of the State of Wisconsin, approved October 11th, 1856, entitled 'An act to grant certain lands to the La Crosse and Milwaukee Railroad Company, and to execute the trust created by an act of Congress entitled "An act granting certain lands to the State of Wisconsin to aid in the construction of railroads in said State," approved June 3d, 1856,' so far as the lands granted by said act of the legislature are applicable to the construction of the road of said railroad company from Madison, by way of Portage City, to the St. Croix River or Lake;

"And whereas the La Crosse and Milwaukee Railroad Company subsequently built and completed sixty-one miles of said railroad, to wit, from Portage City to Tomah, in the State of Wisconsin, but never received any title to or conveyance of said lands, or any portion thereof, except as above specified;

"And whereas the party of the first part subsequently, and in the year one thousand eight hundred and sixty-four, built and completed twenty-eight miles of said railroad, from Columbus to Portage City, in the State of Wisconsin, but never received any title to or conveyance of any of said lands except as above recited;

"And whereas said La Crosse and Milwaukee Railroad Company

subsequently made default in the payment of the interest on said bonds so as aforesaid issued by said La Crosse and Milwaukee Railroad Company, and secured by said deed of trust so as aforesaid given by said last-named company to said Green C. Bronson, James T. Soutter, and Shepard Knapp, trustees; and thereupon said trustees filed their bill of complaint for the foreclosure of said deed of trust in the district court of the United States for the district of Wisconsin on the 5th day of December, 1859, wherein said trustees were named as complainants and the said La Crosse and Milwaukee Railroad Company and others as defendants; and a subpœna to appear and answer in said cause was duly issued out of and under the seal of said court, commanding said defendants, on a certain day therein named, to be and appear in said court and answer said bill of complaint, which was duly served upon defendants in said bill named; and that thereupon such proceedings were had in said court that a decree of foreclosure and sale of said deed of trust was made; and by virtue thereof the marshal of the United States for the district of Wisconsin, on the 25th day of April, 1863, sold and conveyed all the interest of the La Crosse and Milwaukee Railroad Company in and to said lands to William H. White and William Wallace Pratt, which sale was afterwards duly confirmed by the circuit court of the United States for the district of Wisconsin, to which last-named court the jurisdiction of said cause had been transferred by operation of law;

"And whereas the said William H. White and William Wallace Pratt subsequently and on the 5th day of May, 1863, by indenture of deed, conveyed to said Milwaukee and S't Paul Railway Company, the party of the first part, all the right, title, and interest which they had acquired by virtue of said marshal's sale of, in, and to all the lands so as aforesaid granted by Congress to the State of Wisconsin, and by the said act of October 11th, 1856, granted to said La Crosse and Milwaukee Railroad Company:

"Now, therefore, the said party of the first part, in consideration of one dollar to it in hand paid, the receipt whereof is hereby acknowledged, has granted, quitclaimed, and released, and by these presents does grant, quitclaim, and release unto the said party of the second part, and to its successors and assigns forever, all the right, title, interests, or claims of the said party of the first part of, in, and to the whole and every part of the lands so as aforesaid granted by the Congress of the United States to the State of Wisconsin to aid in the construction of railroads in said State, by the act approved June 3d, 1856, and by the said State of Wisconsin granted to the said La Crosse and Milwaukee Railroad Company by an act to grant certain lands to the La Crosse and Milwaukee Railroad Company, and other purposes, approved October 11th, 1856.

"In testimony whereof the party of the first part has caused its corporate seal to be hereto affixed and these presents subscribed by the president and attested by its secretary the day and year first above written.

"For the Milwaukee and S't Paul Railway Company.

"By ALEXANDER MITCHELL,
"*President.*

"Attest:

"[L. S.] ALANSON CARY, *Secretary.*

"In presence of—

"JOHN W. CARY.

"JOHN JOHNSTON."

VIII. On the first day of July, 1875, the United States entered into a written contract with said claimants whereby the claimants agreed to convey the United States mail over route 25002, from Milwaukee to La Crosse, on said railway, twelve times per week each way, for the period of four years from July 1st, 1875, for the consideration of $244 per mile per annum, including $25 per mile per annum for railway post-office cars, which said amount the United States agreed to pay for said service. The said road between Portage and Tomah formed then and still forms a part of said route 25002.

The following was one of the provisions of the said contract:

"9th. That the Postmaster-General may discontinue or curtail the service, in whole or in part, whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any cause; he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and a pro rata compensation for the amount of service retained and continued."

11 IX. The claimant has kept and performed said contract on its part since July 1, 1875, and transported the mail as therein provided, except that the United States discontinued railway post-office cars from Portage to La Crosse, thereby reducing the compensation to be paid for that distance $25 per mile per annum, to wit, to $219 per mile per annum.

The compensation agreed to be paid by the Postmaster-General in the contract of July 1, 1875, was calculated on the basis of the conditions and at the rates prescribed in the act of Congress approved March 3, 1873, chapter 231, entitled "An act making appropriations for the service of the Post-Office Department for the year ending June thirtieth, eighteen hundred and seventy-four."

From July 1, 1876, to January 31, 1878, inclusive, the Postmaster-General has paid the claimant at the rate of $157.68 per mile per annum for the portion of route 25002 lying between Portage and Tomah.

The sum of $157.68 per mile per annum for weight of mails between Portage and Tomah was reached by first reducing the compensation named in the contract of July 1, 1875, viz, $219 per mile per annum, ten per centum per annum, and then allowing eighty per centum of the whole pay after such reduction, because that portion of route 25002, it was claimed, was a railroad constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct.

X. If the defendants are entitled to make no deductions from the contract rates, then there is still due the claimants the sum of $5,980.74 for the service performed from July 1, 1876, to January 31, 1878, both inclusive.

If the defendants are entitled to deduct from the contract price the ten per centum mentioned in section 1 of the act of July 12, 1876, and no more, for said service from July 1, 1876, to January 31, 1878, both inclusive, then there is still due the claimants for such service $3,844.75.

If the claimants are entitled to make such deduction only from the 12th day of July, 1876, then there is still due the claimants for such service $3,888.75.

If the defendants are entitled to deduct from the contract price the ten per centum and also the twenty per centum mentioned in the 13th section of said act of July 12, 1876, then the claimants are not entitled to recover anything.

CONCLUSIONS OF LAW.

1. That the claimants' railroad was not constructed in whole or in part by a land grant made by Congress.

2. That the defendants are entitled to readjust the compensation to be paid to the claimants for the transportation of the mails over their road after July 12, 1876, by reducing said compensation 10 per centum per annum from rates named in the contract referred to in the petition; but such readjustment could bind the claimant only when expressly or tacitly assented to by them.

3. That the claimants are entitled to have and recover from the defendants the sum of three thousand eight hundred and eighty-five dollars and ninety-nine cents ($3,885.99).

12 IV. *Opinion of the court.*

DAVIS, J., delivered the opinion of the court:

The nature of the title which the State of Wisconsin acquired by the act of June 3, 1856, is settled by the decision of the Supreme Court in Schulenberg vs. Harriman (21 Wall., 44):

"The act passed a present interest in the lands designated. * * * The power of disposal and the provision for the lands reverting both imply what the first section in terms declares, that a grant is made; that is, that the title is transferred to the State. It is true that the route of the railroad, for the construction of which the grant was made, was yet to be designated, and until such designation the title did not attach to any specific tracts of land. The title passed to sections to be afterwards located. When the route was fixed the location became certain, and the title, which was previously imperfect, acquired precision and became attached to the land. * * * The provision in the act that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed. * * * It is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to enforce their right to a forfeiture on that ground, the title remains unimpaired in the grantee."

But this grant, though made in fee and defeasable on condition subsequent, was also in trust—

"For the purpose of aiding in the construction of a railroad from Madison or Columbus, by the way of Portage City, to the St. Croix River or Lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield. * * * The lands hereby granted to said State shall be disposed of by said State only in manner following; that is to say, that a quantity of land, not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of roads, respectively, may be sold, and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of either of said roads are completed then another like quantity of land hereby granted may be sold; and so, from time to time, until said roads are completed."

To this trust the following condition was attached:

"That the United States mail shall be transported over said roads, under the directions of the Post-Office Department, at such price as Con-

gress may by law direct: Provided, That until such price is fixed by law the Postmaster-General shall have the power to determine the same."

This condition was intended to attach, and could only attach, to a railroad which the trustee should construct or cause to be constructed in whole or in part by the use of the property conveyed in trust.

The State executed the trust thus reposed in it by conferring upon the La Crosse and Milwaukee Railroad Company, a pre-existing corporation, whose proposed railroad would pass over 61.6 miles of the route contemplated by Congress, the further right to construct the Congressional road and receive the benefit of the land grant; but the measures taken by the State to transfer the land grant to the company differed radically from those taken by Congress to pass the lands to the State. Congress made a statutory grant in præsenti; but the State, although declaring that the rights granted by Congress were thereby granted to the company, enacted that the title to the lands should vest in said company only as the governor of the State should certify to the Secretary of the Interior that a section of twenty miles was completed so as to admit of running regular trains over it; and it further made it the duty of the governor, "in his official capacity, and in behalf of the State, and under the great seal thereof, to execute and deliver to the La Crosse and Milwaukee Railroad Company, whenever it should by virtue of the provisions of the act be entitled to any of said lands, a deed in fee-simple of any of the lands to which said company should be entitled."

13 It is manifest that the railroad company did not acquire title by the mere passage of the statute, as did the State of Wisconsin. By the completion of a section, according to the terms of the act, they acquired a right in equity to demand legal title from the State; but the State clearly proposed to keep within itself the legal title until its governor should execute and deliver the deed or deeds contemplated by the act.

That it was the trustees' duty to retain such control over the trust property as would enable it to enforce the application of it to the object of the trust in the manner contemplated by Congress is plain. Whether the State used the power which it thus retained justly or unjustly, wisely or unwisely, toward the La Crosse and Milwaukee Railroad Company and toward their privies in estate, among whom are the claimants, is not for us to determine. We are to be governed by the undisputed facts that after the La Crosse and Milwaukee Railroad Company had constructed 61.6 miles of railroad on the line projected by Congress, and under the authority derived from the statute which the State had enacted to carry out the trust which it had assumed toward Congress, the State refused to give the company the benefit of the trust property; and that neither that company nor any of its privies in estate has ever received the least direct benefit from the trust. On the contrary, after repeated efforts on the part of that company, and of the trustees of their mortgage, and of the claimants, to secure some benefit from it, the claimants finally acquiesced in a different disposition of the trust property made by the State for the benefit of other parties with the consent of Congress, that creator of the trust.

The defendants contend that the new disposition of the property is in fact an equitable execution of the original trust, and that they are therefore still entitled to the benefit of the condition attached to it. We will consider this proposition.

It seems that the farmers along the line of the La Crosse and Milwaukee Railroad and the farmers along the line of a railroad from Mil-

service under the new law without dissent or protest. We must presume that they acquiesced in its provisions and accepted the change which it made in their contract.

The reduction, however, can only be made for the period subsequent to July 12, 1876, the day when the notice was given. For all service up to that date the claimants are entitled to pay at the contract rates; after that time, at such rates less ten per cent. They are therefore entitled to judgment for the sum of $124.48, for the balance due them for services performed at the old rates, and $3,761.51 for the balance due them for service at the new rates up to and including January 31, 1878.

16 V. *Final judgment.*

At a Court of Claims, held at the Capitol, in the city of Washington, on the third of March, A. D. 1879, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said The Chicago, Milwaukee and Saint Louis Railway Company do have and recover of and from the United States the sum of three thousand eight hundred and eighty-five dollars and ninety-nine cents ($3,885.99).

17 VI. *Application by claimant for, and allowance of, appeal.*

From the judgment rendered in the above-entitled cause, on the third day of March, A. D. 1879, in favor of the claimant, the claimant, by John W. Cary, its attorney, on the 24th day of March, A. D. 1879, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

JOHN W. CARY,
Attorney for Claimant.

Filed March 24, 1879.

And now, to wit, Mar h 24, 1879, it is ordered:
That the appeal be allowed as prayed for.

18 VII. *Application by defendants for, and allowance of, an appeal.*

From the judgment rendered in the above-entitled cause, on the third day of March, A. D. 1879, in favor of the claimant, the defendants, by their Attorney-General, on the 26th day of March, 1879, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Ass't Attorney-General.

Filed March 26, 1879.

And now, to wit, March 26, 1879, it is ordered:
That the appeal be allowed as prayed for.

19 In the Court of Claims.

THE CHICAGO, MILWAUKEE AND SAINT LOUIS Railway Company *vs.* THE UNITED STATES. } No. 11912.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusions of law thereon, of the opinion of the court, of the final judgment of the court, of the application of the claimant and of defendants, respectively, for the allowance of an appeal to the Supreme Court of the United States, and of the orders allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 27th day of March, A. D. 1879.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 194. The Chicago, Milwaukee & Saint Paul Railway Company, appellant, vs. The United States; and No. 195, The United States, appellants (cross appeal), vs. The Chicago, Milwaukee & Saint Paul Railway Company. Court of Claims. Filed 6th June, 1879.